IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA	§	
	§	
V.	§	CAUSE NO. 1:18-CR-64-LY
	§	
MODESTO GONZALEZ, III	§	

MEMORANDUM OPINION AND ORDER

Before the court in the above-styled and numbered cause is the Motion to Suppress Statements filed February 4, 2019 (Dkt. No. 46), the Government's Response in Opposition to Defendant's Motion to Suppress filed February 15, 2019 (Dkt. No. 54), and the Reply to the Government's Response to Gonzalez's Motion to Suppress Statements filed February 19, 2019 (Dkt. No. 56). On February 21, 2019, the court conducted a hearing on the motion at which the Defendant was present and all parties were represented by counsel. Having considered the motion, response, reply, the evidence and testimony presented at the hearing, the applicable law, and the arguments of counsel, the court will deny the motion for the reasons to follow.[1]

I. Background

On February 20, 2018, a grand jury returned an indictment against Defendant Modesto Gonzalez III, charging one count of possession of a firearm by a felon. *See* 18 U.S.C. § 922(g)(1). Gonzalez now seeks to suppress statements he made on January 23, 2018, to federal officers both before and after he received *Miranda* warnings. *See Miranda v. Arizona*, 384 U.S. 436 (1966). Gonzalez argues that his statements should be suppressed: (1) because he was in custody at the time of the statements; (2) he did not voluntarily waive his rights under *Miranda*; and (3) the officers conducted an illegal "two-step" interrogation under *Missouri v. Seibert*, 542 U.S. 600 (2004).

[1] The court previously advised the parties that the court would deny the motion.

For three to six months before Gonzalez's statements, the federal government had been investigating an alleged scheme to defraud non-citizens of the United States. Law-enforcement officers from the Drug Enforcement Administration (DEA), the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), and the Caldwell County Sheriff's Office obtained a federal search warrant to search Gonzalez's residence and property for evidence related to the scheme, as well as for weapons or ammunition. Special Agent Robert Piekenbrock, a DEA agent in charge of the search of Gonzalez's property, testified that he led an operational planning meeting with other members of the taskforce who would be present for the search.[2] In preparation for the meeting, Piekenbrock created a document with information about the location of the property, the crimes of which Gonzalez was suspected, Gonzalez's criminal history, and a plan of action. The document specifically notes the following: "[t]here are no arrest warrants. Gonzalez will not be handcuffed and he will be told he is not under arrest. He will not be read his Miranda warning, but he will be interviewed." The document reflects that law-enforcement officers planned to knock on Gonzalez's door and wait for a response, rather than enter by force. The document further notes "if we find a gun, he may be arrested at the scene with a criminal complaint." An ATF operational plan was also prepared, which contained similar information as that contained within Piekenbrock's plan and likewise noted that "Gonzalez may be arrested at the scene if a weapon is found, felon in possession."

Ten officers arrived at Gonzalez's residence at 7:10 a.m. on January 23, 2018. Piekenbrock testified that the officers arrived in three to five cars with headlights off. The officers had visible law-enforcement markings on the outside of their clothing. They first encountered Gonzalez's wife, Sheila Johnson, who was outside the residence, leaving to take

[2] The court carefully observed Piekenbrock's demeanor during his testimony and finds him to be a credible witness.

their daughter to school. Johnson was wearing pajamas, an overcoat, a scarf, and a beanie. The officers calmly explained to Johnson that they were executing a search warrant on the house. Johnson expressed concern that her daughter would be late for a test at school, and the officers allowed both Johnson and her daughter to leave.

Several officers knocked on the front door of the residence and saw Gonzalez in the kitchen area with his shirt off. They asked Gonzalez if he would step outside and explained they had a search warrant but not an arrest warrant. Piekenbrock testified that Gonzalez appeared agitated, made aggressive hand gestures, and looked like he wanted to fight. Raised voices can be heard at this point on body-camera footage, taken from about 30 feet away from the voices. The officers handcuffed Gonzalez and sat him in a chair outside of his residence. Piekenbrock testified that the officers handcuffed Gonzalez because of Gonzalez's belligerent behavior. There is no evidence to the contrary

Gonzalez was barefoot and wearing only shorts. Shortly after the officers placed Gonzalez in the chair, Gonzalez's stepfather sat down next to Gonzalez. The officers brought Gonzalez a jacket, blanket, and slippers, and told Gonzalez that "you are not under arrest right now." From that point forward, the body-camera footage reflects a respectful and subdued scene. Gonzalez remained handcuffed for approximately 20 minutes, during which time officers searched the residence. At least one officer stood near Gonzalez throughout the period Gonzalez was handcuffed. After 20 minutes, an officer told Gonzalez "if you promise to sit there, we'll take the cuffs off, man" and "don't stand up" and to "be calm, just sit there." After Gonzalez assured officers he would not stand up, the officers removed the handcuffs.

Piekenbrock testified that sometime after the house was searched, he proceeded with the planned interview, inviting Gonzalez to talk if he so desired. Piekenbrock further testified that

Gonzalez agreed to talk with him and that a "group" of officers walked in the general direction of one of the unmarked vehicles. No officer ordered Gonzalez to get into the vehicle, and no officer drew a gun. Piekenbrock again informed Gonzalez that he "was not necessarily going to be arrested, but that the circumstances depended on what agents actually located inside of his residence." By this time, the search of the residence had revealed several firearms, which the officers seized.

Piekenbrock interviewed Gonzalez inside a parked, unlocked government vehicle with the heat on and with the windows rolled halfway down. Gonzalez sat in the front passenger seat. Piekenbrock sat in the driver's seat. Special Agent Paul Schiller of the DEA sat in the rear seat behind Gonzalez, and Special Agent Cole Flores of the ATF sat in the rear seat of behind Piekenbrock.[3] Piekenbrock identified the other officers in the vehicle, explained that the officers did not have an arrest warrant, only a search warrant, and again told Gonzalez he was not under arrest. Piekenbrock laid out what officers knew: he told Gonzalez of two cooperators who were working with the officers and showed Gonzalez receipts the officers had obtained reflecting Gonzalez's signature. Piekenbrock asked Gonzalez if he wanted to explain his side of the story, and Gonzalez "started talking." Piekenbrock proceeded to interview Gonzalez for about 35 minutes, during which time Gonzalez made a number of allegedly incriminating statements about taking "a few hundred thousand dollars" from Mexican nationals and consented to and signed a DEA warrant to search Gonzalez's cell phone, all after Piekenbrock confronted Gonzalez with the receipt books found in Gonzalez's vehicle. Gonzalez also mentioned the Los Zetas drug cartel and claimed that his father was a high-level drug trafficker.

[3] Gonzalez's interview in the vehicle was not recorded or transcribed, and there is no evidence in the record of the exact conversation among Piekenbrock, Flores, and Gonzalez. The court bases its findings on the only evidence in the record of the interview—testimony from Piekenbrock and Flores.

About 35 minutes into the interview, Flores asked Gonzalez about firearms. Gonzalez admitted that he mounted shotguns in his residence and that his son had several loaded weapons and ammunition in the residence. Gonzalez also told Flores that he purchased a revolver from a member of the Aryan Brotherhood.

Piekenbrock testified that Gonzalez's statements about his transaction with the Aryan Brotherhood changed the entire tenor of the interview. As soon as Gonzalez mentioned the Aryan Brotherhood, Piekenbrock stopped the interview and read Gonzalez his *Miranda* rights. This took place at 8:54 a.m., approximately 40 minutes after the interview began. The DEA report of the interview states that "Gonzalez said that he understood his rights and he agreed to waive them and continue the interview." The interview continued immediately in the same vehicle with the same officers questioning Gonzalez. The report further states that "Post Miranda, Gonzalez went over all of the details again with his fraud scheme and he also went over the gun details (purchase of revolver) again." Although Piekenbrock took notes of Gonzalez's pre-*Miranda* statements, Piekenbrock stopped taking notes after Gonzalez received his *Miranda* warnings.

After approximately 15 minutes of post-*Miranda* questioning, Piekenbrock and Flores called an Assistant United States Attorney to discuss the case. Flores told the attorney about the weapons seized from the house and Gonzalez's statements regarding the purchase of a revolver from the Aryan Brotherhood. After a second conversation with the attorney, a decision was made to formally arrest Gonzalez. The officers then informed Gonzalez he was under arrest. The officers removed Gonzalez from the front seat, handcuffed him, and placed him in the back seat of the same vehicle. Piekenbrock testified that Gonzalez was very talkative during his transport to the Bastrop County Jail, during which Gonzalez pointed out ranch properties that

were involved in criminal activities and volunteered information about the purchase of a shotgun he possessed.

II. Legal Standard

"Burdens of production and persuasion generally rest upon the movant in a suppression hearing." *United States v. De la Fuente*, 548 F.2d 528, 533 (5th Cir. 1977). A defendant must demonstrate that the statements he seeks to suppress were obtained while he was under custodial interrogation. *United States v. Charles*, 738 F.2d 686, 692 (5th Cir. 1984) (overruled on other grounds by *United States v. Bengivenga*, 845 F.2d 593 (5th Cir. 1988) (*en banc*)). If the court finds that the statement occurred during a custodial interrogation, then the burden shifts to the prosecution. The prosecution must "establish that the accused in fact knowingly and voluntarily waived Miranda rights when making the statement" for the statement to be admissible. *Berghuis v. Thompkins*, 560 U.S. 370, 382 (2010).[4]

III. Analysis

A. Law of Custody

Miranda warnings must be administered prior to custodial interrogation. A suspect is "in custody" for purposes of *Miranda* "when placed under formal arrest or when a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest." *United States v. Wright*, 777 F.3d 769, 774 (5th Cir. 2015) (quoting *Bengivenga*, 845 F.2d at 596); *see also United States v. Ortiz*, 781 F.3d 221, 229–30 (5th Cir. 2015); *United States v. Cavazos*, 668 F.3d 190, 193 (5th Cir. 2012). "Two discrete inquiries are essential to the [custodial] determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the

[4] The parties agreed at the hearing that the Government would present its evidence first.

interrogation and leave." *Cavazos*, 668 F.3d at 193 (quoting *J.D.B. v. North Carolina*, 564 U.S. 261 (2011)). "The reasonable person through whom we view the situation must be neutral to the environment and to the purposes of the investigation–that is, neither guilty of criminal conduct and thus overly apprehensive nor insensitive to the seriousness of the circumstances." *Id.* (quoting *Bengivenga*, 845 F.2d at 596). Whether a suspect is "in custody" under this standard "is an objective inquiry," *J.D.B.*, 564 U.S. at 270, that "depends on the 'totality of circumstances.'" *Cavazos*, 668 F.3d at 193 (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983)). The subjective views of both the interrogating officers and the person being questioned are not relevant to the court's inquiry.

A court employs several factors to determine whether an individual is in custody, though no one is dispositive: (1) the length of the questioning; (2) the location of the questioning; (3) the accusatory or non-accusatory nature of the questioning; (4) the amount of restraint on the individual's physical movement; and (5) statements made by officers regarding the individual's freedom to move or leave. *Ortiz*, 781 F.3d at 229–30. Generally, "custodial interrogation requires some combination of isolation, restriction of movement, physical restraint and coercive technique." *United States v. Salinas*, 543 Fed. Appx. 458, 463 (5th Cir. 2013).

"'Custody' is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion." *Howes v. Fields*, 565 U.S. 499, 508–09 (2012).

> Not all restraints on freedom of movement amount to custody for purposes of *Miranda* and the Supreme Court has decline[d] to accord talismanic power to the freedom-of-movement inquiry . . . and [has] instead asked the additional question whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*.

Id. at 509. "Inherently compelling pressures . . . are often present when a suspect is yanked from familiar surroundings in the outside world and subjected to interrogation in a police station." *Id.* at 511 (quotations and citations omitted).

Gonzalez and the Government rely primarily on three Fifth Circuit cases. Because a custody analysis is a fact-intensive analysis, the court reviews the facts of the three cases relied upon by Gonzalez and the Government and compares them to the facts before the court today.

a. United States v. Cavazos

Cavazos was awakened from his bed at 5:30 a.m. and immediately handcuffed, while more 14 officers entered and searched his home. *Cavazos*, 668 F.3d at 191–92. The officers allowed Cavazos to put pants on and took him into his kitchen, while an entry team cleared the house. *Id.* at 192. The officers uncuffed Cavazos and, once the house was secured, asked Cavazos "if there was a private room in which they could speak." *Id.* The officers "informed Cavazos that this was a 'non-custodial interview,' that he was free to get something to eat or drink during it, and that he was free to use the bathroom." *Id.* At various points during the interview, the officers allowed Cavazos to move about the house; however, the officers followed and monitored Cavazos when he went to the bathroom and made a phone call. *Id.* Toward the end of the interview, Cavazos "agreed to write a statement for the agents in his kitchen." *Id.* "From beginning to end, the interrogation of Cavazos lasted for more than one hour, and the agents' conduct was always amiable and non-threatening." *Id.*

In considering the totality of the circumstances surrounding the interview, the circuit court affirmed the district court's conclusion that Cavazos was in custody during the time in which he was questioned by police. *Id.* at 194. The circuit notes that "a large number of officers entered Cavazos's home, without his consent, early in the morning, and Cavazos's subsequent movement about the home was continually monitored," and that "Cavazos was immediately located and handcuffed at the start of the search, demonstrating that the agents sought out Cavazos and had physical dominion over him." *Id.* Although "the handcuffs were

removed prior to interrogation, the experience of being singled out and handcuffed would color a reasonable person's perception of the situation and create a reasonable fear that the handcuffs could be reapplied at any time." *Id.* at 195.

b. United States v. Wright

At 7:00 a.m., 12 law-enforcement officers executed a search warrant at Wright's residence, six of which had guns drawn as they entered the residence. *Wright*, 777 F.3d at 771. The officers knocked and announced, entered, cleared the house, and forced all of the residents to exit. *Id.* As the search of the residence was taking place, an officer approached Wright, who was wearing pajamas, "and told him that he wanted to talk to him." *Id.* The officer "escorted Wright to his bedroom so that he could change into more appropriate clothing." *Id.* After Wright changed clothes, an officer escorted him to a patrol vehicle, at which time the officer "told Wright that he was not under arrest and that he was free to leave at any time." *Id.*

Wright sat in the front passenger seat, while an officer sat in the driver's seat and another officer sat in the back seat. *Id.* Once seated, an officer again told Wright "he was not under arrest and that he was free to leave." *Id.* Prior to questioning Wright, the officer "read Wright his *Miranda* rights, explained to him the nature of the investigation, and proceeded to ask him questions." *Id.* at 771–72. The entire interview was recorded and lasted one hour and two minutes. *Id.* at 771.

The circuit court affirmed the district court's denial of a motion to suppress, noting "significant differences" between Wright's case and the facts of *Cavazos*. "First, unlike in *Cavazos*, we are reviewing a district court's *denial* of a motion to suppress, which means that we must review the evidence *in the light most favorable to the government*, rather than the defendant," as the court did in *Cavazos*. *Id.* at 776. "Also crucial" to the court's decision "is the

fact that, according to Wright's own testimony, he was told by Officer Barnes '[s]everal times' that he was 'free to leave' and that he 'wasn't under arrest.'" *Id.* (citing *Cavazos*, 668 F.3d at 195 and noting officer's statements that interview is non-custodial is not equivalent to "an assurance that he could terminate the interrogation and leave"). Finally, the court noted that "unlike the defendant in *Cavazos*, Wright was not singled out and handcuffed when arresting officers entered his home." *Id.*

In considering the totality of the circumstances, the circuit found that although the number of officers "was startling and intimidating" and the length of the interview weighed in favor of a finding that Wright was in custody, the following factors weighed against a determination that Wright was in custody: (1) the officer "repeatedly assured Wright that he was not under arrest and that he was free to leave;" (2) the lack "of evidence that Wright was physically restrained during the interrogation, which took place close to the home, in a car subject to public scrutiny;" and (3) the indication from the "transcript of the interview and the cooperative tone throughout" that the "conversation was as much an opportunity taken by Wright to tell his story to the officers as it was an opportunity taken by the officers to get information from Wright." *Id.* at 777.

c. United States v. Ortiz

In *Ortiz*, law-enforcement officers activated their vehicles' emergency lights and used the vehicles to box-in Ortiz's vehicle at a gas station. *Ortiz*, 781 F.3d at 224. Officers drew their guns, asked Ortiz to "turn off his engine, get out, hold his hands out to the side, and walk towards the front of the vehicle." The officers told Ortiz either "you're not under arrest right now" or "you're not under arrest." *Id.* The officers began asking Ortiz questions. Several other officers arrived, one of which decided to frisk Ortiz—who was suspected of a trafficking guns—

and handcuffed him while doing so, for five to 10 minutes. *Id.* at 225. The officers removed the handcuffs and directed Ortiz to a police vehicle "so we can further discuss what we've already talked about." *Id.* Once inside, officers asked Ortiz detailed questions, and an officer wrote a statement based on Ortiz's answers. *Id.* Ortiz read this statement, made corrections to it, and signed the statement. *Id.* Ortiz and the officers were in the car for 20 to 40 minutes. *Id.*

The circuit court in *Ortiz* discussed *Wright* and *Cavazos*, noting that Ortiz's case "falls neatly" between the two cases. Officers "told Ortiz he was not under arrest, but they did not explicitly tell him he was free to leave," which "[u]nlike the 'non-custodial' statement in *Cavazos* . . . suggest[s] to a reasonable person that he was free to leave, but [the statements] are less clear than the statements in *Wright*." *Id.* at 231. The court again distinguished *Cavazos*, noting that "[u]nlike the immediate singling-out and handcuffing in *Cavazos*," the officers' approach with Ortiz "indicated that the purpose of the encounter was to speak with Ortiz, not to arrest him, but the fact that the agents eventually handcuffed him would suggest to a reasonable person that he was not free to leave." *Id.* at 232. The court noted that the fact that Ortiz's interview in a police car "took place in a public location weighs against the conclusion that a suspect is in custody." *Id.* at 231.

The circuit further noted that two final considerations "show that Ortiz was not in custody." *Id.* at 232. First the court considered "the manner in which Ortiz was detained," which took place as part of a *Terry* stop and was "similar to those of an ordinary traffic stop, a situation in which a suspect is not in custody." *Id.*; *see also Terry v. Ohio*, 392 U.S. 1 (1968). The court also observed that "Ortiz was near his vehicle and had his keys so he had a readily available means to leave, a fact that is highly relevant to whether a reasonable person would have felt free to depart." *Id.* The court contrasted this with "the suspects

in *Wright* and *Cavazos*" who "were detained in raids on their houses." *Id.* The court also noted that Ortiz had his cell phone with him and "could have made calls." *Id.* The court concluded that "a reasonable person detained in the manner that Ortiz was would be more likely to feel free to leave compared to a person detained in the manner that Wright and Cavazos were." *Id.* Finally, the court noted the length of the officers' interaction with Ortiz—30 minutes, 20 minutes of which were in the police vehicle—and contrasted this with the facts of *Wright* and *Cavazos*, in which the interviews lasted close to an hour. *Id.* at 233.

The Government relies heavily on *Ortiz* in its argument. But *Ortiz* is a distinct factual scenario—an interrogation after Ortiz's vehicle was stopped—as opposed to an interrogation incident to a search of a residence. *Ortiz*, 781 F.3d at 232–33. Although the *Ortiz* court discusses *Wright* and *Cavazos*, it contrasts "the manner in which Ortiz was detained," which was "similar to those of an ordinary traffic stop, a situation in which a suspect is not in custody," with "the suspects in *Wright* and *Cavazos*" who "were detained in raids on their houses." *Id.* This court thus finds *Ortiz* of less benefit than *Wright* and *Cavazos*.

B. Was Gonzalez in custody?

In conducting a totality-of-the-circumstances analysis of whether Gonzalez was in custody, the court first looks to the circumstances surrounding the interview including: (1) the length of the questioning, (2) the location of the questioning, (3) the accusatory or non-accusatory nature of the questioning, (4) the amount of restraint on Gonzalez's physical movement, and (5) statements made by officers regarding the Gonzalez's freedom to move or leave. *Ortiz*, 781 F.3d at 229–30 (citing *Wright*, 777 F.3d at 774–75). The court also considers "the additional question whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Howes*, 565 U.S. at 509.

The totality of the circumstances surrounding Gonzalez's interview leads this court to the conclusion that Gonzalez was not in custody.

Gonzalez was handcuffed at the beginning of the search, but he was not "singled out" from a number of persons at the scene. Although there were several persons present, two–Gonzalez's wife and daughter–were leaving when the officers arrived, and one–Gonzalez's stepfather–was not in the residence, but in an adjoining trailer. Gonzalez was visible in the residence when the officers knocked on the door, and the officers only handcuffed Gonzalez and placed him in a chair outside the residence when he became belligerent. Although the morning was cold, and Gonzalez was not fully dressed, Gonzalez chose to exit the residence and become belligerent dressed in that manner. Soon after the officers handcuffed Gonzalez and placed him in the chair, they brought him a jacket, shoes, and blanket. Gonzalez is not heard complaining of his treatment, and the officers did not restrict Gonzalez's stepfather from sitting next to him. The officers did not handcuff Gonzalez's stepfather. Gonzalez remained handcuffed for about 20 minutes. The court finds this to not be an unreasonable time to allow Gonzalez to calm down after his earlier behavior toward the officers. Neither Gonzalez nor his stepfather asked the officers to remove the handcuffs nor asked to leave.

The officers did not explicitly tell Gonzalez he was free to leave, a factor the *Wright* and *Cavazos* courts found to be "crucial" in their custody analyses. *Wright*, 777 F.3d at 776; *Cavazos*, 668 F.3d at 195. However, the officers repeatedly told Gonzalez that he "was not necessarily going to be arrested," but the final decision depended on what the officers actually located inside the residence. The court does not interpret the officers' actions in telling Gonzalez to remain seated in the chair after his handcuffs were removed as instructions of confinement. The court finds that Gonzalez was belligerent toward the officers, the officers handcuffed him,

they placed him in a chair, and, after a period of time sitting and talking with his stepfather, Gonzalez calmed down. Observing this, the officers determined to remove the handcuffs. The court does not find the admonitions "if you promise to sit there, we'll take the cuffs off, man," "don't stand up," and "be calm, just sit there" as language of confinement or arrest. Rather, observing the body-camera footage of the scene, it appears the officers were ensuring that Gonzalez had in fact calmed down and were cautioning him not to make sudden movements or again become belligerent. Gonzalez assured the officers he would remain seated, and the officers removed the handcuffs, after which time Gonzalez did remain seated and calm. There is no evidence that Gonzalez was handcuffed for any reason other than his belligerency.

Gonzalez's pre-*Miranda* interview within the government vehicle lasted approximately 40 minutes. The officers interviewed Gonzalez for an additional 15 minutes after reading Gonzalez his *Miranda* rights. Altogether, the officers questioned Gonzalez for close to an hour—a similar amount of time the defendants were questioned in *Cavazos* and *Wright*. Almost two hours passed between the time the officers entered Gonzalez's residence and Piekenbrock read Gonzalez his *Miranda* rights.

Much like the defendant in *Wright*, Gonzalez was interviewed in the front passenger seat of a law-enforcement vehicle on Gonzalez's property and within 40 feet of his residence, with the vehicle's windows partly down, and without restraint. *Cf. Wright* at 777 (noting "no evidence that Wright was physically restrained during the interrogation, which look place close to the home, in a car subject to public scrutiny"). As reflected in the 36 minutes of body-camera footage, prior to the interview in the vehicle, the officers were respectful and calm toward Gonzalez. The interview in this case was neither recorded nor transcribed, as was the case in

Wright and *Cavazos*. Nor is this case similar to *Ortiz*, as the defendant there signed a statement detailing what he told the police inside their vehicle.

But from the evidence before the court—the testimony of Piekenbrock and Flores—and in considering the totality of the circumstances surrounding the interview, the court concludes that Gonzalez's freedom of movement was not constrained to a degree associated with a formal arrest, nor did the environment in which he was interviewed present the same inherently coercive pressures as the type of station-house questioning at issue in *Miranda*. *See Howes*, 565 U.S. at 509 (requiring courts to look at whether interview presented inherently coercive pressures). The court credits Piekenbrock's testimony that Gonzalez willingly agreed to speak with officers, agreed to get in the vehicle, never asked to leave, and never asked for a lawyer. At the time officers began the interview, Gonzalez had been uncuffed for approximately 40 minutes, and he was not restrained during the interview. The windows of the vehicle were partially down, and Gonzalez could see and be seen by members of his household, who were only 40 feet away. Piekenbrock also testified that Gonzalez, at times, volunteered information without being prompted to do so and consented to a search of his phone.

There is no evidence of coercive behavior or coercive questioning by the officers. To the contrary, the officers asked Gonzalez to tell his side of the story and he agreed to do so. A review of *Cavazos*, *Wright*, and *Ortiz* reveals some facts in each that are similar to the facts now before this court. And, indeed, there are similarities among the facts of the three cases. But none directly overlay the facts of another. "[S]tatements made in different circumstances will have different meanings and differently affect the coercive element against which *Miranda* seeks to protect." *Cavazos*, 668 F.3d at 193. Under the facts of this case, the court finds a reasonable person would not conclude he was in custody. The totality of the circumstances demonstrates

that the statements Gonzalez seeks to suppress were not made during a custodial interrogation. Accordingly, the court will not suppress Gonzalez's pre-*Miranda* statements.

C. Should Gonzalez's post-*Miranda* statements be suppressed?

Gonzalez also seeks to suppress his post-*Miranda* statements, arguing that officers intended to circumvent the protections provided by *Miranda* by conducting an impermissible two-step interrogation. A two-step interrogation takes place when a suspect is questioned first, then read *Miranda* rights later, and questioned again about the substance of the pre-*Miranda* statements. The Supreme Court "requires the suppression of a post-warning statement only where a deliberate two-step strategy is used" in "a calculated way to undermine the *Miranda* warning." *Missouri v. Seibert*, 542 U.S. 600, 621–22 (2004) (Kennedy, J., concurring in the judgment).[5]

> Post-warning statements that are related to the substance of pre-warning statements must be excluded unless curative measures are taken before the post-warning statement is made. Curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver. For example, a substantial break in time and circumstances between the pre-warning statement and the *Miranda* warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn.

United States v. Courtney, 463 F.3d 333, 338 (5th Cir. 2006) (citing *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring in the judgment)). In *Seibert*, officers "followed instructions from [another officer] that he refrain from giving *Miranda* warnings." *Seibert*, 542 U.S. at 604–05. Officers then questioned [the defendant] without *Miranda* warnings for 30 to 40 minutes" obtained a confession and then "confronted [the defendant] with her prewarning statements." *Id.*

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[5] *Seibert*'s holding is set forth "in Justice Kennedy's opinion concurring in the judgment." *See United States v. Nunez-Sanchez*, 478 F.3d 663, 668 n.1 (5th Cir. 2007).

If a deliberate two-step strategy is not used to circumvent *Miranda*, "subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights." *Oregon v. Elstad*, 470 U.S. 298, 314 (1985)[6]; *see also United States v. Lim*, 897 F.3d 673, 692 (5th Cir. 2018), *cert. denied*, No. 18-714, 2019 WL 113208 (U.S. Jan. 7, 2019). *Elstad* "allow[s] a post-warning confession even where the police had previously obtained a pre-warning confession, so long as the pre-warning confession was voluntary." *Nunez-Sanchez*, 478 F.3d at 668. "Under *Elstad*, the relevant inquiry is whether, in fact, the second statement was also voluntarily made." *United States v. Courtney*, 463 F.3d 333, 338 (5th Cir. 2006).

The Government bears the burden of showing a defendant voluntarily waived his *Miranda* rights. "Even absent the accused's invocation of the right to remain silent, the accused's statement during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused in fact knowingly and voluntarily waived *Miranda* rights when making the statement." *Thompkins*, 560 U.S. at 382. A defendant's valid waiver requires his "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *United States v. Cardenas*, 410 F.3d 287, 293 (5th Cir. 2005). The

[6] In *Elstad*, the police stopped by the suspect's home to inform his mother that he would be taken into custody for burglary. *Elstad*, 470 U.S. at 300. While one officer spoke to the mother, another officer told the suspect that he believed the suspect had committed burglary. *Id.* at 301. The suspect responded by admitting that he had been at the scene. *Id.* Subsequently, the suspect was taken to the station, where *Miranda* warnings were administered and the suspect confessed to the crime. *Id.*

Government bears the burden of "showing that the accused understood these rights." *Thompkins*, 560 U.S. at 384.

a. *Seibert* Analysis

The court concludes that Gonzalez has not met his heavy burden in demonstrating that the Government deliberately utilized a two-step strategy in "a calculated way to undermine the *Miranda* warning." *Seibert*, 542 U.S. at 622. Piekenbrock's operational plan contemplated that Gonzalez would be interviewed by officers but not *Mirandized*. It also contemplated that Gonzalez could be arrested if firearms were found in his home. However, Piekenbrock testified that officers did not determine that Gonzalez would be arrested until after Gonzalez admitted to buying a revolver from the Aryan Brotherhood and after the questioning officers presented the facts and circumstances to a federal prosecutor for review. The court finds this testimony persuasive, and notes that Gonzalez did not offer conflicting evidence sufficient to show that the officers engaged in a calculated effort to obscure the practical and legal significance of Gonzalez's *Miranda* warning. Nor did Gonzalez offer any evidence to suggest that officers acted coercively. *Cf. Lim*, 897 F.3d at 692. There is no evidence that the Government engaged in a deliberate tow-step strategy. There is no evidence to dispute that, in the vernacular of the day, Gonzalez's interjection of a transaction with the Aryan Brotherhood was a "gamechanger," so far as the planned interview was concerned. In lieu of such evidence, the court cannot conclude that the officers acted deliberately to circumvent the protections of *Miranda*.

The court turns to the *Elstad* inquiry, to determine "whether, in fact, the second statement was also voluntarily made." 470 U.S. at 318. Here, too, the court concludes that Gonzalez's post-*Miranda* statements were voluntarily made. Piekenbrock testified that Gonzalez stated he understood his rights and agreed to waive them and continue the interview. Gonzalez did not

present any evidence to the contrary. Considering the totality of the circumstances, including the facts leading up to the post-*Miranda* admissions, the court concludes that the Government has met its burden in showing that Gonzalez waived his rights and voluntarily continued with the interview.

IT IS THEREFORE ORDERED that Motion to Suppress Statements filed February 4, 2019 (Dkt. No. 46) is **DENIED**.

SIGNED this 12th day of March, 2019.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE